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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 SANTY SAYAVANH,

11 Plaintiff,

12 v.

13 CITY OF TUKWILA, et al.,

14 Defendants.

CASE NO. C11-0038JLR

ORDER ON DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT

15 **I. INTRODUCTION**

16 This matter comes before the court on Defendants City of Tukwila (“the City”),
17 Ceith Cullens, and Douglas Johnson’s motion for summary judgment (Dkt. # 11). Mr.
18 Cullens and Mr. Johnson are both police officers with the Tukwila Police Department.
19 (Cullens Decl. (Dkt. # 13) ¶ 2; Johnson Decl. (Dkt. # 14) ¶ 2.) Having considered the
20 submissions of the parties, the balance of the record, and the relevant law, and neither
21 party having requested oral argument, the court GRANTS in part and DENIES in part
22 Defendants’ motion (Dkt. # 11).

II. BACKGROUND

At approximately 2:00 a.m. on August 8, 2010, five officers from the Tukwila Police Department, including Officers Cullens and Johnson, were dispatched to a fight in the parking lot of a casino that involved approximately ten subjects. (Cullens Decl. ¶ 4; Johnson Decl. ¶ 5.) The officers responded to the call in marked police vehicles and with their lights and sirens activated. (Johnson Decl. ¶ 5.) One of the police vehicles contained a dashboard video camera that recorded some of the subsequent events.¹ (*See* Not. of Filing of Physical Materials (Dkt. # 10) (“COBAN Video”).) The video recording provided to the court does not have audio.

When the officers arrived at the casino, there were many people in the parking lot and it was full of vehicles. (Cullens Decl. ¶ 4; Johnson Decl. ¶ 5.) The police vehicle that was equipped with the video camera parked on the side of the casino facing the rear of the parking lot. (COBAN Video at 2:17-2:36.) The video camera recorded a section of the parking lot that included an expanse of asphalt on the left and approximately five vehicles parked in a row on the right. (*Id.* at 2:36.) The vehicle that was parked farthest from the video camera and at the end of the row was a blue truck. (*Id.*)

A few seconds after the police vehicle arrived, the video recording depicts Mr. Sayavanh walking by the row of cars on the right with his hands in his pockets. (*Id.* at 2:41.) Mr. Sayavanh is five feet, seven inches tall and weighs 130 pounds. (Ragonesi

¹ “Where video evidence contradicts a party’s version of the events, on a motion for summary judgment a court must accept as depicted the video provided” *Fillmore v. Sharp*, No. 2:10cv00620 JWS, 2011 WL 5191369, at *3 (D. Ariz. Nov. 2, 2011) (citing *Scott v. Harris*, 550 U.S. 372, 380-81 (2007)).

1 Decl. (Dkt. # 12) at 16.) On the video, he is walking slowly between the parked cars and
2 appears to be looking for something. (COBAN Video at 2:41-3:50.) Mr. Sayavanh
3 testified that he had lost his cell phone and was looking for it. (Ragonesi Decl. at 4
4 (Sayavanh Dep. at 24:1-2).) For the next few minutes, the video recording shows Mr.
5 Sayavanh walking around the parking lot apparently looking for his cell phone.
6 (COBAN Video at 2:42-5:06.)

7 Meanwhile, Officer Johnson was in a different area of the parking lot assisting
8 with the arrest of a man who was later identified as Andy Somvilay, a cousin of Mr.
9 Sayavanh. (Johnson Decl. ¶ 5.) When the police arrived at the casino, Mr. Somvilay was
10 in the parking lot and looked as though he had been involved in an altercation. (*Id.*) Mr.
11 Somvilay failed to comply with Officer Johnson's repeated orders to sit down and
12 resisted another officer's physical attempt to take him to the ground. (*Id.*) As a result,
13 Officer Johnson delivered a single blast of pepper spray to Mr. Somvilay's face and then
14 assisted with handcuffing him. (*Id.*)

15 After Mr. Somvilay was detained, Officer Cullens observed a female nearby who
16 appeared to be concerned for Mr. Somvilay. (Cullens Decl. ¶ 4.) Officer Cullens later
17 learned that the female was related to both Mr. Somvilay and Mr. Sayavanh (*id.* at 2 n.1),
18 and Mr. Sayavanh's complaint indicates that her name is Khanthala Somvilay and that
19 she and Mr. Sayavanh are cousins (Compl. ¶ 4.5).² Officer Cullens began to interview
20 Ms. Somvilay, and as they were talking, they walked away from where Mr. Somvilay had
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22 ² The record does not indicate the relationship between Mr. Somvilay and Ms. Somvilay.

1 | been detained and toward the blue truck depicted in the video recording. (Cullens Decl. ¶
2 | 4.)

3 | At this point, the video recording depicts Mr. Sayavanh on the left side of the
4 | camera frame. (COBAN Video at 5:06.) He appears to be talking with someone off
5 | camera, and he gestures to this person with his arms out to his sides. (*Id.*) Officer
6 | Cullens testified that Mr. Sayavanh tried to get his attention about looking for the missing
7 | cell phone. (Cullens Decl. ¶ 4.) Officer Cullens testified that he told Mr. Sayavanh that
8 | he would talk to Mr. Sayavanh after he was finished with his investigation of the assault
9 | because that was more important. (*Id.*)

10 | A few seconds later, the video shows Ms. Somvilay and Officer Cullens walking
11 | over to the blue truck and inspecting it. (COBAN Video at 5:13-5:23.) According to
12 | Officer Cullens, the blue truck appeared to have been in a collision, and Ms. Somvilay
13 | was explaining to him that it belonged to Mr. Somvilay and that Mr. Somvilay's friend
14 | had crashed it. (Cullens Decl. ¶ 5.) As Officer Cullens and Ms. Somvilay inspected the
15 | blue truck, the video shows Mr. Sayavanh walking over to the row of parked cars, and
16 | continuing his search for his lost cell phone. (COBAN Video at 5:23-5:39.) Officer
17 | Cullens testified that Mr. Sayavanh was yelling occasionally about his cell phone being
18 | lost. (Cullens Decl. ¶ 5.)

19 | After inspecting the blue truck, the video shows Officer Cullens and Ms. Somvilay
20 | standing near the rear of the truck and continuing the interview. (COBAN Video at
21 | 5:39.) In the video, Officer Cullens removes his notepad from his pocket and begins to
22 | take notes. (*Id.*; Cullens Decl. ¶ 5.) While Officer Cullens is still interviewing Ms.

1 Somvilay, the video shows Mr. Sayavanh walking towards them. (COBAN Video at
2 5:44.) Mr. Sayavanh is approximately four cars away from them when he begins to walk
3 in their direction. (*Id.*) According to Officer Cullens, Mr. Sayavanh yelled something
4 about his phone as he walked towards them. (Cullens Decl. ¶ 5.) Mr. Sayavanh testified
5 that he yelled “hey, have you seen my cell phone?” to Ms. Somvilay—not to Officer
6 Cullens. (Ragonesi Decl. at 5 (Sayavanh Dep. at 25:1-2).) Mr. Sayavanh testified that
7 Ms. Somvilay looked at him but did not give him a verbal response. (*Id.* (Sayavanh Dep.
8 at 25:7-13).) Officer Cullens also testified that he looked up at Mr. Sayavanh and then
9 looked back at his notebook. (Cullens Decl. ¶ 5.)

10 After failing to get a response from Ms. Somvilay, Mr. Sayavanh testified that he
11 continued to walk toward her and Officer Cullens. (Ragonesi Decl. at 5 (Sayavanh Dep.
12 at 25:16); COBAN Video at 5:44-53.) The video shows that Mr. Sayavanh’s hands are
13 down at his sides as he walks but that several times he opens his palms toward Officer
14 Cullens and Ms. Somvilay and moves his extended arms out to his sides in a small
15 gesture. (COBAN Video at 5:44-53.) When he is almost to the blue truck, the video
16 shows him making a larger gesture with his arms out to his sides and then hiking up his
17 pants. (*Id.* at 5:54.) He then continues to walk toward Officer Cullens and Ms.
18 Somvilay, but at a slightly slower speed than before. (*Id.* at 5:55.)

19 Officer Cullens testified that as Mr. Sayavanh walked toward them, Mr. Sayavanh
20 yelled again about the lost cell phone and that when he told Mr. Sayavanh that he “did
21 not care right now,” Mr. Sayavanh yelled, “What did you say?” (Cullens Decl. ¶ 6.)
22 Officer Cullens further testified that Mr. Sayavanh then dropped his hands down to his

1 sides and started walking straight at the officer. (*Id.*) According to Officer Cullens, Mr.
2 Sayavanh “was puffing out his chest and staring through me.” (*Id.*) In contrast, Mr.
3 Sayavanh testified that he “just walked towards them” and that he and Officer Cullens did
4 not say anything to each other. (Ragonesi Decl. at 5-6 (Sayavanh Dep. at 25:14-24, 26:1-
5 3).) The video evidence does not resolve these disputed facts, and on a motion for
6 summary judgment, the court must credit Mr. Sayavanh’s version of events.

7 When Mr. Sayavanh is approximately two large steps away from Officer Cullens,
8 the video shows Officer Cullens suddenly throwing down his notepad and taking one
9 large step toward Mr. Sayavanh. (COBAN Video at 5:56-57.) The video shows that
10 Officer Cullens contacts Mr. Sayavanh’s chest with his palms and then takes several steps
11 forward as he shoves Mr. Sayavanh hard to the ground. (*Id.* at 5:57-59.) Approximately
12 13 seconds passed between time when Mr. Sayavanh began to walk toward Officer
13 Cullens and Ms. Somvilay and the moment when Officer Cullens first made contact with
14 Mr. Sayavanh’s body. (*Id.* at 5:44-57.)

15 The video shows Mr. Sayavanh landing on his back, and his feet coming up into
16 the air. (*Id.* at 5:58-6:00.) Officer Cullens pushes Mr. Sayavanh’s feet to the side and
17 grabs Mr. Sayavanh’s right arm as he attempts to roll Mr. Sayavanh over in order to
18 apply handcuffs. (*Id.* at 6:00-01.) Officer Cullens testified that he gave Mr. Sayavanh
19 oral commands to comply and turn around. (Cullens Decl. ¶ 8.) Viewing the video
20 evidence in the light most favorable to Mr. Sayavanh, it appears that he resisted Officer
21 Cullens’s initial attempts to roll him onto his stomach and bring his right arm behind his
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1 back, but that he did not attempt to kick or hit Officer Cullens or otherwise escape.
2 (COBAN Video at 6:00-02.)

3 The video next shows Officer Johnson running over to assist Officer Cullens. (*Id.*
4 at 6:00-6:03.) When Officer Johnson arrives at Officer Cullens's side, the video shows
5 that Mr. Sayavanh is on his stomach, his right hand is behind his back, and his left hand
6 appears to be pinned under his body. (*Id.* at 6:02-03.) The video shows Officer Johnson
7 bending down over Mr. Sayavanh (*id.* at 6:06), and Officer Johnson testified that he tased
8 Mr. Sayavanh on his right hip in drive-stun mode (Johnson Decl. ¶ 6). Mr. Sayavanh
9 testified that Officer Johnson tased him three times for approximately two to three
10 seconds each time (Ragonesi Decl. at 17 (Sayavanh Dep. at 31:9-12)), while Officer
11 Johnson testified that he only tased Mr. Sayavanh twice (Johnson Decl. ¶6). The tasings
12 occurred within the 30 seconds during which Officer Johnson was bent over Mr.
13 Sayavanh, but the video recording does not show the tasings themselves. (COBAN
14 Video at 6:06-6:35.) Mr. Sayavanh testified that the tasings "hurt" and that he felt like he
15 was "getting electrocuted." (Ragonesi Decl. at 17 (Sayavanh Dep. at 31:21-23).)

16 After Officer Johnson tased Mr. Sayavanh, the officers placed him in handcuffs.³
17 (Johnson Decl. ¶ 6.) Officer Cullens told Mr. Sayavanh that he was under arrest, assisted
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19 ³ Mr. Sayavanh alleged in his complaint that Officer Johnson tased him after he was
20 handcuffed. (Compl. ¶ 4.10.) Mr. Sayavanh, however, cannot oppose a properly supported
21 summary judgment motion by resting on the allegations in his pleadings, *Anderson v. Liberty*
22 *Lobby, Inc.*, 477 U.S. 242, 256 (1986), and in opposing Defendants' motion for summary
judgment, Mr. Sayavanh did not submit evidence that Officer Johnson tased him after he was
handcuffed. Accordingly, Mr. Sayavanh has not satisfied his burden to create a genuine issue of
material fact on this question.

1 him in standing up, and walked him over to Officer Cullens's police vehicle. (Cullens
2 Decl. ¶ 9.) According to Officer Cullens, Mr. Sayavanh complained of having a
3 "scratch" on his cheek, so Officer Cullens brought a medic over to examine Mr.
4 Sayavanh. (*Id.*)

5 Mr. Sayavanh was charged in Tukwila Municipal Court with obstructing an officer
6 and resisting arrest. (Ragonesi Decl. at 13-14.) He stipulated to probable cause, and the
7 case was dismissed with prejudice. (*Id.* at 16.)

8 On December 6, 2010, Mr. Sayavanh filed the instant action in the Washington
9 State Superior Court for King County. (Compl.) Mr. Sayavanh brought state law claims
10 for assault and battery against Officers Cullens and Johnson, as well as 42 U.S.C. § 1983
11 excessive force claims against the officers. (*Id.* ¶¶ 5.1-5.11.) Mr. Sayavanh also brought
12 a vicarious liability claim against the City. (*Id.* ¶¶ 5.12-5.14.) Defendants timely
13 removed to this court (Not. of Removal (Dkt. # 1)), and have now filed a motion for
14 summary judgment seeking dismissal of all of Mr. Sayavanh's claims (Mot. (Dkt. # 11)).
15 The motion is fully briefed and ripe for the court's consideration.

16 III. ANALYSIS

17 A. Summary Judgment Standard

18 Summary judgment is appropriate if the evidence, when viewed in the light most
19 favorable to the non-moving party, demonstrates "that there is no genuine dispute as to
20 any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ.
21 P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v. Cnty. of*
22 *L.A.*, 477 F.3d 652, 658 (9th Cir. 2007). The moving party bears the initial burden of

1 showing that there is no genuine issue of material fact and that he or she is entitled to
2 prevail as a matter of law. *Celotex*, 477 U.S. at 323. If the moving party meets his or her
3 burden, then the non-moving party “must make a showing sufficient to establish a
4 genuine dispute of material fact regarding the existence of the essential elements of his
5 case that he must prove at trial” in order to withstand summary judgment. *Galen*, 477
6 F.3d at 658. The non-moving party cannot oppose a properly supported summary
7 judgment motion by “rest[ing] on mere allegations or denials of his pleadings.”
8 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The court is “required to
9 view the facts and draw reasonable inferences in the light most favorable to the [non-
10 moving] party.” *Scott v. Harris*, 550 U.S. 372, 378 (2007).

11 **B. Mr. Sayavanh’s § 1983 Claims for Excessive Force Against the Officers**

12 The court begins by considering Defendants’ motion for summary judgment based
13 on the officers’ assertion of qualified immunity. Qualified immunity protects
14 government officials from liability for civil damages insofar as their conduct does not
15 violate clearly established statutory or constitutional rights about which a reasonable
16 person would have known. *Mattos v. Agarano*, 661 F.3d 433, 440 (9th Cir. 2011) (en
17 banc) (citing *Pearson v. Calahan*, 555 U.S. 223, 231 (2009)). In determining whether an
18 official is entitled to qualified immunity, courts apply a two-step test: First, the court
19 must determine if, taking the facts in the light most favorable to the non-moving party,
20 the officer violated one of the plaintiff’s constitutional rights. *Id.* Second, if the answer
21 to the first question is “yes,” then the court must “determine whether the constitutional
22 right was ‘clearly established in light of the specific context of the case’ at the time of the

1 events in question.” *Id.* (quoting *Robinson v. York*, 566 F.3d 817, 821 (9th Cir. 2009));
2 *see also Bryan v. MacPherson*, 630 F.3d 805, 823 (9th Cir. 2010).

3 All allegations that law enforcement officers have used excessive force are
4 examined under the Fourth Amendment and its reasonableness standard, and the
5 framework outlined by the Supreme Court in *Graham v. Connor*, 490 U.S. 386 (1989).
6 *Smith v. City of Hemet*, 394 F.3d 689, 700 (9th Cir. 2005). The Supreme Court has
7 declared that the “reasonableness” inquiry is whether the officer’s actions are
8 “objectively reasonable” in light of the facts and circumstances confronting him or her.
9 *Graham*, 490 U.S. at 397. The court applies *Graham* by first considering the nature and
10 quality of the alleged intrusion, and then considering the governmental interests at stake
11 by looking at: (1) the severity of the crime at issue, (2) whether the suspect poses an
12 immediate threat to the safety of the officers or others, and (3) whether he is actively
13 resisting arrest or attempting to evade arrest by flight. *Mattos*, 661 F.3d at 441.

14 The court’s consideration of reasonableness, however, is not limited to these three
15 factors. Rather, the court must consider the totality of the circumstances and weigh the
16 gravity of the intrusion against the government’s interest to determine whether the force
17 employed was constitutionally reasonable. *See Miller v. Clark Cnty.*, 340 F.3d 959, 968
18 (9th Cir. 2003); *see also Mattos*, 661 F.3d at 441 (“[I]n assessing the governmental
19 interests at stake under *Graham*, we are free to consider issues outside the three
20 enumerated . . . when additional facts are necessary to account for the totality of
21 circumstances in a given case.”). “In some cases . . . , the availability of alternative
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1 methods of capturing or subduing a suspect may be a factor to consider.” *Smith*, 394
2 F.3d at 701.

3 Furthermore, reasonableness “must be judged from the perspective of a reasonable
4 officer, on the scene, rather than with the 20/20 vision of hindsight.” *Graham*, 490 U.S.
5 at 396; *Drummond v. City of Anaheim*, 343 F.3d 1052, 1058 (9th Cir. 2003). “The
6 calculus of reasonableness must embody allowance for the fact that police officers are
7 often forced to make split-second judgments—in circumstances that are tense, uncertain,
8 and rapidly evolving—about the amount of force that is necessary in a particular
9 situation.” *Graham*, 490 U.S. at 396-97; *see also Mattos*, 661 F.3d at 442. Because
10 “[n]ot every push or shove, even if it may seem unnecessary in the peace of the judge’s
11 chambers, . . . violates the Fourth Amendment,” *Graham*, 490 U.S. at 396, “[n]either
12 tackling nor punching a suspect to make an arrest necessarily constitutes excessive
13 force,” *Blankenhorn v. City of Orange*, 485 F.3d 463, 477 (9th Cir. 2007). “Force is
14 excessive when it is greater than is reasonable under the circumstances.” *Santos v. Gates*,
15 287 F.3d 846, 854 (9th Cir. 2002). “When the circumstances show that there is no need
16 for force, any force used is constitutionally unreasonable.” *Sanders v. City of Fresno*,
17 551 F. Supp. 2d 1149, 1166 (E.D. Cal. 2008) (citing *Fontana v. Haskin*, 262 F.3d 871,
18 880 (9th Cir. 2001), and *Motley v. Parks*, 432 F.3d 1072, 1089 (9th Cir. 2005)); *cf. P.B. v.*
19 *Koch*, 96 F.3d 1298, 1303 n.4 (9th Cir. 1996). “Because [the excessive force inquiry]
20 nearly always requires a jury to sift through disputed factual contentions, and to draw
21 inferences therefrom, . . . summary judgment . . . in excessive force cases should be
22 granted sparingly.” *Mattos*, 661 F.3d at 441 (citing *Santos*, 287 F.3d at 853).

1 Here, Mr. Sayavanh has alleged that Officer Cullens used excessive force when he
2 shoved Mr. Sayavanh to the pavement, and that Officer Johnson used excessive force
3 when he tased Mr. Sayavanh multiple times. (Compl. ¶¶ 5.7-5.11.) The court analyzes
4 each allegation of excessive force separately.

5 **1. Officer Cullens's Shove**

6 First, the court must determine whether, viewing the evidence in Mr. Sayavanh's
7 favor, a reasonable jury could conclude that Officer Cullens violated Mr. Sayavanh's
8 Fourth Amendment rights when he shoved Mr. Sayavanh to the ground. The court begins
9 its analysis by considering the nature and quality of the force used against Mr. Sayavanh.
10 *See Mattos*, 661 F.3d at 443. The video evidence shows that Officer Cullens took a quick
11 step towards Mr. Sayavanh, placed his open hands on Mr. Sayavanh's chest, and then
12 took several steps forward as he shoved Mr. Sayavanh to the ground hard. (COBAN
13 Video at 5:56-6:00.) Officer Cullens then forced Mr. Sayavanh onto his stomach and
14 handcuffed his hands behind his back. (*Id.* at 6:00-35.) At the very least, these actions
15 caused minor injury to Mr. Sayavanh's face. (Cullens Decl. ¶ 9.)

16 Defendants contend that Officer Cullens used a "push-pull" defensive technique
17 on Mr. Sayavanh and that this is a level one, or lowest level, use of force. (Mot. at 11-
18 12.) This argument, however, does not accurately reflect Officer Cullens's testimony.
19 Officer Cullens testified that he attempted to use a "push-pull" tactic but that when this
20 was unsuccessful, he proceeded simply to "push" Mr. Sayavanh to the ground. (Cullens
21 Decl. ¶¶ 7-8.) Indeed, viewing the video evidence in Mr. Sayavanh's favor, it does not
22 appear that Officer Cullens ever attempted to "pull" Mr. Sayavanh, only that he pushed

1 Mr. Sayavanh. (*See* COBAN Video at 5:56-59.) Nevertheless, the court concludes that
2 Officer Cullens used a low level of force against Mr. Sayavanh. *See Josfan v. Indochine*,
3 No. CV 09-07904 AHM (PLAx), 2012 WL 113371, at *9 (C.D. Cal. Jan. 13, 2012)
4 (finding that officers who physically grabbed the plaintiff, forced him to the ground, and
5 handcuffed him caused a “limited and slight” imposition on the plaintiff’s Fourth
6 Amendment rights).

7 Next, the court considers the governmental interests at stake. The first *Graham*
8 factor is the severity of the crime at issue. Mr. Sayavanh was ultimately charged with
9 obstructing an officer and resisting arrest. (Ragonesi Decl. at 13-14.) At the time when
10 Officer Cullens shoved Mr. Sayavanh to the ground, the only crime at issue was
11 obstructing an officer. This is not a serious offense. *See Davis v. City of Las Vegas*, 478
12 F.3d 1048, 1055 (9th Cir. 2007) (noting that trespassing and obstructing a police officer
13 are not severe crimes).

14 The second *Graham* factor is whether Mr. Sayavanh “posed an immediate threat
15 to the safety of the officers or others.” *Mattos*, 661 F.3d at 445 (citation omitted). As
16 noted above, this is the “most important single element” of the governmental interests at
17 stake. *Id.* at 445 (quoting *Smith*, 384 F.3d at 702). “A simple statement by an officer that
18 he fears for his safety or the safety of others is not enough; there must be objective
19 factors to justify such a concern.” *Bryan*, 360 F.3d at 826 (quoting *Delore v. Rutherford*,
20 272 F.3d 1272, 1281 (9th Cir. 2001)). When Mr. Sayavanh first yelled to Ms. Somvilay
21 to ask her whether she had seen his cell phone, he was over ten feet away from her and
22 Officer Cullens. (*See* Ragonesi Decl. at 7 (Sayavanh Dep. at 27:8-10).) Officer Cullens

1 responded by looking up at Mr. Sayavanh and then looking back at his notebook.
2 (Cullens Decl. ¶ 5.) At this point, the court has little difficulty concluding that Mr.
3 Sayavanh was not an immediate threat to anyone.

4 After failing to get a response from Ms. Somvilay, Mr. Sayavanh continued to
5 walk toward her and Officer Cullens. (Ragonesi Decl. at 5 (Sayavanh Dep. at 25:16);
6 COBAN Video at 5:44-53.) Mr. Sayavanh's actions in the next few seconds are in
7 dispute. Mr. Sayavanh testified that he "just walked towards them" and that neither he
8 nor Officer Cullens spoke any words to each other. (Ragonesi Decl. at 5-6 (Sayavanh
9 Dep. at 25:14-24, 26:1-3).) In contrast, Officer Cullens testified Mr. Sayavanh continued
10 to yell about his lost cell phone as he approached and that he responded aggressively
11 when Officer Cullens stated that he "did not care right now" about the missing cell
12 phone. (Cullens Decl. ¶ 6.) Officer Cullens also testified that Mr. Sayavanh "was
13 puffing out his chest and staring through me" and that Mr. Sayavanh's actions and
14 demeanor indicated that he was going to attack Officer Cullens. (*Id.* ¶ 7.) The video
15 evidence shows that Mr. Sayavanh made several gestures with his arms as he walked
16 toward Officer Cullen, but it does not show whether they spoke to each other.

17 On summary judgment, the court must view the evidence in the light most
18 favorable to Mr. Sayavanh and credit his version of the facts over any conflicting
19 testimony. Doing so, the court concludes that a reasonable jury could find that a
20 reasonable officer on the scene would have understood that Mr. Sayavanh was not an
21 immediate threat to anyone's safety. In fact, a reasonable jury could conclude that
22 Officer Cullens's use of force was unprovoked. Mr. Sayavanh was not walking at a fast

1 pace, his hand gestures are consistent with a person who was exasperated about being
2 unable to find a lost cell phone, and it does not appear in the video that he ever balled his
3 fists or made any threatening gestures toward Officer Cullens. Particularly in light of Mr.
4 Sayavanh's testimony that Officer Cullens did not give him any verbal commands at this
5 time, a reasonable officer on the scene could have assumed that Mr. Sayavanh was
6 walking over to ask a question, rather than to assault an officer.

7 The third *Graham* factor is whether the suspect was actively resisting arrest or
8 attempting to evade arrest by flight. When Officer Cullens pushed Mr. Sayavanh, the
9 evidence shows that he was neither resisting arrest nor attempting to flee.

10 Finally, the court "must examine the totality of the circumstances and consider
11 'whatever specific factor may be appropriate in a particular case, whether or not listed in
12 *Graham*.'" *Mattos*, 661 F.3d at 445 (quoting *Bryan*, 630 F.3d at 826 (quotation
13 omitted)). Although the court recognizes that officers must "make split-second
14 judgments . . . about the amount of force that is necessary in a particular situation,"
15 *Graham*, 490 U.S. at 396-97, the court considers it relevant in this case that there is no
16 evidence in the record that Officer Cullens gave Mr. Sayavanh any verbal command to
17 stop walking toward him and Ms. Somvilay. Even if the court credited Officer Cullens's
18 testimony that he told Mr. Sayavanh that he "did not care right now" about the lost cell
19 phone, this was not an order that Mr. Sayavanh should stop his approach, nor was it a
20 warning that the officer would use physical force on him.

21 In weighing the governmental interests at stake against the level of force
22 employed, the court concludes that a reasonable jury could determine that Officer Cullens

1 used excessive force against Mr. Sayavanh, thereby violating his Fourth Amendment
2 rights. Although Officer Cullens used a low level of force, the evidence, when viewed in
3 Mr. Sayavanh's favor, supports a finding that none of the *Graham* factors weigh in the
4 officer's favor. Indeed, a reasonable jury could determine that no use of force was
5 justified under the circumstances and that Officer Cullens's use of force was unprovoked.

6 Because summary judgment on Mr. Sayavanh's excessive force claim is
7 unwarranted, the court must determine whether Officer Cullens nevertheless is entitled to
8 qualified immunity because the alleged constitutional violation described above was not
9 "'sufficiently clear' that every 'reasonable official would have understood that what he
10 [was] doing violate[d] that right.'" *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2083 (2011)
11 (quoting *Anderson v. Creighton*, 483, U.S. 635, 640 (1987)). The law must be clearly
12 established such that it would "be clear to a reasonable officer that his conduct was
13 unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001),
14 *overruled on other grounds by Pearson*, 555 U.S. at 223. The court does "not require a
15 case directly on point, but existing precedent must have placed the statutory or
16 constitutional question beyond debate." *Ashcroft*, 131 S. Ct. at 2083.

17 "The Supreme Court and Ninth Circuit have found that an unprovoked use of
18 force is unreasonable under the Fourth Amendment in the absence of any resistance,
19 attempt at flight, danger to the officer, or any other exigent circumstance." *Newman v.*
20 *San Joaquin Delta Cmty. Col. Dist.*, No. CIV. 2:09-3441 WBS KJN, 2010 WL 2179964,
21 at *4 (E.D. Cal. May 27, 2010) (denying motion to dismiss the plaintiff's excessive force
22 claim based on qualified immunity and citing *Graham*, 490 U.S. at 397; *Tennessee v.*

1 *Garner*, 471 U.S. 1, 8-9 (1985); *Robinson v. Solano Cnty.*, 278 F.3d 1007, 1014 (9th Cir.
2 2002); *Priester v. City of Riviera Beach, Fla.*, 208 F.3d 919, 927 (9th Cir. 2000)).
3 “[P]olice officers do not have the right to shove, push, or otherwise assault innocent
4 citizens without any provocation whatsoever.” *Id.* (quoting *Lanigan v. Vill. of E. Hazel*
5 *Crest, Ill.*, 110 F.3d 467, 475 (7th Cir. 1997)). “Given this history, any reasonable officer
6 would know that he or she does not have the right to drag a person to the ground and pin
7 that person there in the absence of flight, provocation, or other exigent circumstances.”
8 *Id.* The court therefore concludes that Mr. Sayavanh had a clearly established right to be
9 free from allegedly unprovoked force by being shoved to the ground and that Officer
10 Cullens is not entitled to summary judgment based on qualified immunity.⁴ Accordingly,
11 the court denies Defendants’ motion for summary judgment with respect to Mr.
12 Sayavanh’s § 1983 claim against Officer Cullens.

13 **2. Officer Johnson’s Use of His Taser**

14 Next, the court must determine whether Officer Johnson violated Mr. Sayavanh’s
15 constitutional rights when he tased Mr. Sayavanh. As with Mr. Sayavanh’s excessive
16 force claim against Officer Cullens, the court begins by considering the nature and

17
18 ⁴ Defendants cite *Hinton v. City of Elwood*, 997 F.2d 774 (10th Cir. 1993), in support of
19 their argument that Officer Cullens is entitled to qualified immunity. (Mot. at 14-15). In *Hinton*,
20 the police officers wrestled the plaintiff to the ground after he shoved a police officer and then
21 walked away when he was told that he was under arrest. *Hinton*, 997 F.2d at 776-77. The Tenth
22 Circuit found that the officers did not violate any constitutional right. *Id.* at 782. The facts
precipitating the officers’ use of force in *Hinton*, however, are distinguishable from those in the
instant case. Whereas the plaintiff in *Hinton* assaulted an officer and ignored the officers’
commands before there was a use of force, in this case, a reasonable jury could find that Officer
Cullens’s use of force against Mr. Sayavanh was unprovoked and that Mr. Sayavanh did not
disregard any orders. As such, *Hinton* does not dictate a finding that Officer Cullens’s actions
were reasonable or that he is entitled to qualified immunity.

1 quality of the force use against Mr. Sayavanh. *See Mattos*, 661 F.3d at 443. Officer
2 Johnson tased Mr. Sayavanh either two or three times using the Taser’s drive-stun mode.
3 (Ragonesi Decl. at 17 (Sayavanh Dep. at 31:9-12); Johnson Decl. ¶ 6.) In *Mattos*, the
4 Ninth Circuit declined to determine what level of force specifically is used when a Taser
5 is used in drive-stun mode. *Mattos*, 661 F.3d at 443. Nevertheless, the Ninth Circuit
6 proceeded to determine whether the officer’s use of the Taser against the plaintiff was
7 reasonable, “keeping in mind the magnitude of the electric shock at issue and the extreme
8 pain that [the plaintiff] experienced.” *Id.* Accordingly, this court also proceeds to
9 examine the governmental interest in light of Officer Johnson’s use of his Taser in drive-
10 stun mode. The court also takes into account the fact that the Tukwila Police Department
11 considers a Taser application in drive-stun mode to be a low level pain compliance
12 technique and a low level use of force. (Johnson Decl. ¶ 7.)

13 With respect to the first *Graham* factor, the underlying crime was obstructing an
14 officer, and, as discussed above, this is not a serious offense.⁵ Consideration of the
15 second two *Graham* factors, however, demonstrates that at least some force was justified
16 under the circumstances. First, viewing the video evidence in Mr. Sayavanh’s favor,
17 there is no reasonable dispute that Officer Cullens was struggling on the ground with Mr.
18 Sayavanh when Officer Johnson rushed over to assist. (COBAN Video at 6:00-6:06.)
19 Even though the video evidence does not show that Mr. Sayavanh ever attempted to

21 ⁵ The court recognizes that Mr. Sayavanh was also charged with resisting arrest, and the
22 court considers this fact below in discussing the third *Graham* factor—whether Mr. Sayavanh
was actively resisting arrest or attempting to evade arrest.

1 strike either officer, a reasonable officer on the scene could have believed that Mr.
2 Sayavanh posed an immediate threat to Officer Cullens. In addition, the video evidence
3 shows that Mr. Sayavanh resisted Officer Cullens's initial attempt to roll him onto his
4 stomach and pull his right arm behind his back in order to handcuff him. (*Id.* at 6:00-02.)
5 It is not apparent from the video evidence, however, that Mr. Sayavanh attempted to flee.

6 Finally, the court considers as an additional factor the number of tasings Mr.
7 Sayavanh experienced and the time period in which he received them. *Baird v. Ehlers*,
8 No. C10-1540JLR, 2011 WL 5838431, at *9 (W.D. Wash. Nov. 21, 2011). Mr.
9 Sayavanh testified that Officer Johnson tased him three times for approximately two to
10 three seconds each time. (Ragonesi Decl. at 17 (Sayavanh Dep. at 31:9-12).) The video
11 evidence shows that Officer Johnson was only bent over Mr. Sayavanh for 30 seconds,
12 therefore all tasings occurred during this window of time. (*Id.* at 6:06-6:35.) In *Mattos*,
13 the Ninth Circuit found that the officer's tasing of the plaintiff three times over the course
14 of less than one minute was an "overwhelmingly salient factor." *Mattos*, 661 F.3d at 445.
15 The court reasoned that "[t]hree tasings in such rapid succession provided no time for
16 [the plaintiff] to recover from the extreme pain she experienced, gather herself, and
17 reconsider her refusal to comply [with the officer's orders]." *Id.*; see also *Beaver v. City*
18 *of Fed. Way*, 507 F. Supp. 2d 1137, 1149 (W.D. Wash. 2007), *aff'd*, 301 Fed. Appx. 704
19 (9th Cir. 2008) ("[A]ny decision to apply multiple applications of a Taser must take into
20 consideration whether a suspect is capable of complying with an officer's commands.").

21 In considering the totality of the circumstances, the court determines that Officer
22 Johnson's first use of the Taser was objectively reasonable given that Mr. Sayavanh was

1 resisting Officer Cullens. There are questions of fact, however, regarding whether the
2 second and third applications of the Taser were excessive. It is unclear from the record
3 whether Officer Johnson gave Mr. Sayavanh an opportunity to recover from each tasing
4 and comply with Officer Cullens's verbal commands, and whether Mr. Sayavanh
5 continued to be an immediate threat to any officer or continued to resist arrest after the
6 first tasing.

7 Nevertheless, the court concludes that Officer Johnson is entitled to qualified
8 immunity because it was not clearly established at the time that his use of the Taser could
9 violate Mr. Sayavanh's Fourth Amendment rights. In March 2010, just a few months
10 before the incident giving rise to this lawsuit, a three-judge panel of the Ninth Circuit
11 decided *Brooks v. City of Seattle*, 599 F.3d 1018 (9th Cir. 2010), which was later
12 superseded by the en banc decision in *Mattos*, 661 F.3d at 433. In *Brooks*, the court held
13 that the officers acted reasonably when they tased a pregnant woman three times in drive-
14 stun mode after she refused orders to sign a traffic citation and get out of her car. *Brooks*,
15 599 F.3d at 1030. The plaintiff in *Brooks* had resisted arrest by tightening her grip on the
16 steering wheel so that the officers could not remove her from the car. *Id.*

17 *Brooks* and the instant case are similar in that they both involve originating
18 offenses that were not serious and plaintiffs who resisted arrest but did not act violently
19 toward the officers. Further, they each involved the application of a Taser in drive-stun
20 mode to the plaintiff three times within a short period of time. In light of the *Brooks*
21 decision, it was not clearly established in August 2010 that Officer Johnson's use of the
22 Taser in drive-stun mode against Mr. Sayavanh could violate Mr. Sayavanh's

1 constitutional rights. *See Mattos*, 661 F.3d 433 (reversing the panel decision in *Brooks*
2 and holding that the plaintiff alleged a constitutional violation but that the officers were
3 entitled to qualified immunity because the alleged violation was not clearly established).
4 Therefore, the court grants Defendants’ motion for qualified immunity with respect to
5 Officer Johnson.

6 **C. Mr. Sayavanh’s Claims for Assault and Battery Against the Officers**

7 Mr. Sayavanh alleges state law claims of assault and battery against Officer
8 Cullens (Compl. ¶¶ 5.1-5.3) and Officer Johnson (*id.* ¶¶ 5.4-5.6). Defendants argue that
9 these claims must be dismissed because Mr. Sayavanh failed to comply with RCW
10 Chapter 4.96. (Mot. at 16.) RCW 4.96.010(1) provides in pertinent part that filing a
11 claim for damages within the time allowed by law is a condition precedent to the
12 commencement of any action claiming damages. RCW 4.96.010(1). RCW 4.96.020(1)
13 requires a plaintiff to file a claim against the government entity, as well as its individual
14 agents. RCW 4.96.020(1). Defendants claim that Mr. Sayavanh failed to file any claim
15 for damages against either the City or the officers prior to initiating the instant lawsuit.
16 (Mot. at 16.) In response, Mr. Sayavanh concedes that this argument “appears” to be
17 “well-founded and likely to prevail.” (Resp. (Dkt. # 16) at 5.) In light of Mr. Sayavanh’s
18 concession and the lack of any evidence that he complied with RCW Chapter 4.96, the
19 court grants Defendants’ motion for summary judgment with respect to Mr. Sayavanh’s
20 state law claims for assault and battery against Officers Cullens and Johnson.

D. Mr. Sayavanh's Claim for Vicarious Liability Against the City

Mr. Sayavanh alleges that the City is liable for Officers Cullens's and Johnson's alleged violations of 42 U.S.C. § 1983 under the doctrine of *respondent superior*. (Compl. ¶¶ 5.12-5.14.) Defendants argue that this claim must be dismissed based on the Supreme Court's holding in *Monnell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978). (Mot. at 8.) Mr. Sayavanh admits that this argument "appears" to be "well-founded and likely to prevail." (Resp. at 5.) The court agrees.

In *Monnell*, the Court held that local government units were "persons" for purposes of § 1983, but that they could only be held liable where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monnell*, 436 U.S. at 690. The Court made clear, however, that municipalities "cannot be held liable under § 1983 on a *respondeat superior* theory" and may only be held liable where "action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.* at 691. Here, Mr. Sayavanh has failed to allege that a policy, practice, or custom of the City led to the alleged constitutional violations by the officers. Rather, Mr. Sayavanh alleged that the City is liable on a *respondeat superior* theory, which is plainly foreclosed by the Court's holding in *Monnell*. Accordingly, the court grants Defendants' motion for summary judgment with respect to Mr. Sayavanh's claim against the City.

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Dated this 23rd day of March, 2012.

JAMES L. ROBERT
United States District Judge